UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JO-ANNE HENRY,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Docket No. 03-127-P-H**
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises several questions: whether the administrative law judge failed to consider appropriately the opinions of the some of the treating medical professionals and whether he appropriately analyzed the plaintiff's claims of pain and her credibility. I recommend that the court vacate the commissioner's decision and remand the case for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920, *Goodermote v. Secretary of Health & Human Servs.*, 69 F.3d 5, 6 (1st Cir. 1982), the

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1381(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held by telephone on January 28, 2004, pursuant to Local Rule 16.2(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

administrative law judge found, in relevant part, that the plaintiff suffered from degenerative disc disease and post-traumatic stress disorder ("PTSD"), impairments that were severe but which did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Findings 3-4, Record at 19; that the plaintiff's allegations concerning her limitations were not totally credible, Finding 5, *id*.; that the plaintiff had the residual functional capacity to walk, stand, sit and occasionally lift 20 pounds, and to lift 10 pounds frequently, Finding 7, *id*.; that she could stoop and climb stairs occasionally but never climb ladders, ropes or scaffolds, should not do constant bending and should avoid kneeling, squatting, crouching or crawling and should not use foot controls, *id*.; that she had the ability to relate to others and get along with family and friends, to understand, carry out and remember simple instructions, to respond appropriately to supervision, co-works and usual work situations and to use judgment, and to do routine repetitive work and deal with changes, *id*.; that performance of the plaintiff's past relevant work was not precluded by her residual functional capacity, Finding 8, *id*.; that while the plaintiff's exertional limitations did not allow her to perform the full range of light work, use of Rule 202.20 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid") as a framework resulted in the conclusion that there were a significant number of jobs in the national economy that she could perform, Finding 9, *id*.; and that, because her limitations did not preclude the plaintiff from performing her past relevant work, she was not disabled as that term is defined in the Social Security Act at any time through the date of the decision, Findings 10-11, *id*. at 20. The Appeals Council declined to review the decision, *id*. at 5-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence, 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of*

Health & Human Servs., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination made must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 4 of the sequential review process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 1464 n.5 (1987). At this step the commissioner must make findings of the plaintiff's residual functional capacity and the physical and mental demands of past work and determine whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 83-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-1982 ("SSR 82-62") at 813.

Discussion

The administrative law judge found that the plaintiff's past relevant work was as a cashier and a laborer (factory worker). Record at 18-19. He found that she could also perform work as a sales attendant, house setter [sic], locker room attendant, cleaner (housekeeping), fast food worker, surveillance system monitor, cashier, and charge account clerk. *Id*.

The plaintiff first contends that the administrative law judge ignored the opinion of her treating psychiatrist, Kevin DiCesare, M.D., that she was unable to work due to PTSD, in violation of 20 C.F.R. § 404.1527(d)(2) and Social Security Ruling 96-5p. Itemized Statement of Errors, etc. ("Itemized Statement") (Docket No. 4) at 2. She relies on Dr. DiCesare's completion of a one-page form dated December 27, 2001 on which he states that "anxiety issues prevent work at this time" and that this limitation is expected to last "[about] 12 months." *Id.*; Record at 321. The plaintiff also asserts that the

administrative law judge was similarly deficient in his treatment of the opinion of Amir Khan, M.D., that she met Listing 1.04 (disorders of the spine), Itemized Statement at 3; Record at 329-30, but at oral argument her counsel conceded that none of Dr. Khan's medical records show that any of the criteria of Listing 1.04 were met. The claim concerning Dr. Khan accordingly provides no basis for remand.

Of course, the question whether a claimant is disabled or meets a particular listing is reserved to the commissioner. Social Security Ruling 96-5p ("SSR 96-5p"), reprinted in *West's Social Security Reporting Service* Rulings (Supp. 2003), at 123. At oral argument, counsel for the commissioner contended that the administrative law judge was not required to address Dr. DiCesare's opinion that the plaintiff could not work because it was not a medical opinion under 20 C.F.R. § 404.1527(e)(1). That regulation does provide that certain opinions, including opinions that the claimant is disabled, "are not medical opinions, as described in paragraph (a)(2) of this section." That subsection of the regulation defines medical opinions, and the next subsection describes how such opinions will be considered. 20 C.F.R. § 404.1527(a)(2) & (b). Neither regulation can reasonably be construed to excuse an administrative law judge from the requirement of SSF 96-5p that "opinions from any medical source on issues reserved to the Commissioner must never be ignored." *Id*. at 124.

The opinion mentions that Dr. DiCesare saw the plaintiff on October 26, 2001 "with pain complaints," diagnosed PTSD "at times with depressive features, moderate stressors, and GAF 60 to 65," and "increased her Paxil and recommended ongoing counseling . . . with Ms. Mele [sic]." Record at 15. The administrative law judge also noted:

> The claimant reported to Dr. DiCesare in December 2001 that she was handling stress better since Paxil was increased, and it helped with her depressive symptoms more. In February 2002 Ms. Henry reportedly felt she was handling ongoing stress issues remarkably well, had progressed a lot since being in

> treatment, was less anxious about things, and did not feel significantly depressed. She was taking Paxil regularly with no side effects.
>
> Ms. Henry testified that she had received . . . psychiatric treatment from Dr. DiCesare for 7 months.

Id. at 17. He refers to Exhibit 15F, *id*. at 15, but not to Exhibit 14F, which includes the note from Dr. DiCesare on which the plaintiff relies. This again appears to be an insufficient discussion under SSR 96-5p of the administrative law judge's reasons for his necessarily-implied rejection of Dr. DiCesare's conclusion in December 2001 that the plaintiff was totally disabled by her anxiety. In this case, the plaintiff can demonstrate prejudice resulting at least in part from this failure. The undisputed medical evidence in the record after December 2001 may be inconsistent with total disability due to anxiety, as the opinion appears to suggest, but that is not the only possible interpretation.

In addition, a report from Dorothy Miele, a licensed therapist,[2] dated July 11, 2002 indicates extreme limitations in the areas of ability to perform activities within a schedule, to maintain attendance and punctuality, and to travel in unfamiliar places or to use public transportation; and marked limitations in the areas of ability to complete a normal work day and work week without interruptions from psychologically based symptoms and to perform at a consistent pace; to accept instructions and respond appropriately to criticism from superiors; and to get along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes. Record at 341-44. The administrative law judge does not discuss these findings at all. The opinion notes only that the plaintiff "testified that she had received counseling from therapist Dorothy Mele [sic] for the past year," that Miele "[o]n July 11 [2002] . . . diagnosed her with

[2] As the plaintiff acknowledges, Itemized Statement at 4, Dorothy Miele, a counselor whom she saw 21 times, is not an acceptable medical source under 20 C.F.R. §§ 404.1513(a) and 416.913(a), and her opinions and evaluation of the plaintiff accordingly may not be used to establish the existence of an impairment. However, that information may be used to show the severity of an impairment and how it affects the claimant's ability to work. 20 C.F.R. §§ 404.1513(d)(1), 416.913(d)(1).

PTSD and chronic pain" and that "[t]he medical expert could not comment on the therapist's degree of functional limitations and stated that the documentation was not from a treating psychiatrist and was not very comprehensive." *Id*. at 17. Counsel for the commissioner contended at oral argument that these entries constituted sufficient consideration of Miele's report and evidence that the administrative law judge "gave it reduced weight." He also asserted that the residual functional capacity adopted by the administrative law judge essentially adopted the limitations indicated by Miele. A comparison of Miele's report, Record at 342-44, with the administrative law judge's discussion of limitations, id. at 17, demonstrates convincingly that the administrative law judge did not come anywhere near adopting Miele's limitations.

The fact that Miele is not a psychiatrist does not mean that the administrative law judge could ignore her records when evaluating the severity of the PTSD which he found to exist. 20 C.F.R. §§ 404.1513(d)(1), 404.1529(a), 416.913(d)(1), 416.929(a). While it remains the province of the commissioner to evaluate conflicting evidence, the commissioner's own rulings make clear that she may not ignore such evidence. Contrary to the argument of counsel for the commissioner, that is what happened here. This court will not undertake to evaluate *de novo* conflicting evidence concerning the severity of a claimant's limitations. The limitations identified by Miele could directly affect the plaintiff's ability to perform her past relevant work. The plaintiff is entitled to remand for further, explicit consideration of the reports of Dr. DiCesare and Ms. Miele. *See generally Jozefowicz v. Heckler*, 811 F.2d 1352, 1358-59 (10th Cir. 1987).

I will briefly address the plaintiff's remaining claims on appeal. She contends that the administrative law judge improperly analyzed her claims of pain and improperly discounted her credibility. Itemized Statement at 4-7. While the decision does not describe any limitations on the plaintiff's residual functional capacity as being due to pain, it does include limitations which, based on the medical evidence in the record,

could only result from the pain about which the plaintiff complained: she "should do no constant bending; avoid kneeling, squatting, crouching, and crawling; and should not use foot controls [and] can stoop and climb stairs occasionally." Record at 17. In addition, counsel for the plaintiff conceded that there was no evidence in the record of any specific limitation due to the pain. Contrary to the plaintiff's assertion, Itemized Statement at 4, the decision does include consideration of the factors required by 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3) for evaluating pain. Record at 15-17. This analysis is also minimally sufficient under *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 23 (1st Cir. 1986).

With respect to his evaluation of the plaintiff's credibility, however, the administrative law judge did not comply with the terms of the applicable Ruling. The opinion states that "the claimant's allegations regarding her limitations are not totally credible for the reasons set forth in the body of the decision." Record at 19. No analysis of credibility is set forth in the body of the decision. Social Security Ruling 96-7p provides:

> It is not sufficient for the adjudicator to make a single, conclusory statement that "the individual's allegations have been considered" or that "the allegations are (or are not) credible." It is also not enough for the adjudicator simply to recite the factors that are described in the regulations for evaluating symptoms. The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.

Social Security Ruling 96-7p ("SSR 96-7p"), reprinted in *West's Social Security Reporting Service* Rulings (Supp. 2003), at 134. No specific reasons for the finding on credibility are identified as such in the decision, nor is the weight given to the plaintiff's statements clear from the context of the decision. Counsel for the commissioner contended at oral argument that the following two sentences in the administrative law judge's opinion presented a sufficient statement of reasons under SSR 96-7p:

> Ms. Henry reported being active with her four children (ages 2, 5, 10, and 15), four dogs, and nine cats. She washed 4-5 medium loads of laundry daily and had gardening hobbies but state those activities were limited due to pain.

Record at 17. This is a recitation of some of the evidence bearing on some of the factors which the administrative law judge is required to consider under the regulations. It cannot reasonably be construed as a statement of reasons for a finding on credibility, and certainly not as a statement concerning the weight given to the plaintiff's testimony. The plaintiff is entitled to remand on this basis as well.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of January, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

JO-ANNE HENRY represented by **DANIEL W. EMERY**
36 YARMOUTH CROSSING DR
P.O. BOX 670
YARMOUTH, ME 04096

(207) 846-0989
Email: danemery@maine.rr.com

V.

Defendant

COMMISSIONER OF SOCIAL SECURITY

represented by **JAMES M. MOORE**
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344
Email: jim.moore@usdoj.gov